U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 January 2006

CASE NO: 2005-LHC-493

OWCP NO.: 07-118452

IN THE MATTER OF

KEITH L. MASON,
Claimant

v.

GULF BEST ELECTRIC CO.,
Employer

and

HIGHLANDS INSURANCE COMPANY
Carrier

APPEARANCES:

Christopher R. Schwartz, Esq.
On behalf of Claimant

Douglass M. Moragas, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Keith L. Mason (Claimant) against Gulf Best Electric Co. (Employer) and Highlands Insurance Co. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on June 6, 2005, in Metairie, Louisiana.

At the hearing, the parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 5 exhibits, which were admitted, including Dr. Knight's medical records, Dr. Ruel's medical records, Dr. Ruel's deposition, Steven Furst's deposition, and a request for treatment with Dr. Bartholomew.[1] Employer introduced 6 exhibits, including the vocational reports of Carla Seyler, notes of conversations with Claimant, the report of Dr. J. Monroe Laborde, the deposition of Dr. J. Monroe Laborde, and Claimant's deposition.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated and I find:

1. An injury occurred on December 6, 1989.

2. The injury occurred in the course and scope of employment.

3. An employer/employee relationship existed at the time of injury.

4. Employer was advised of the injury on December 7, 1989.

5. A notice of controversion was timely filed on August 14, 1991.

6. An informal conference was held on November 16, 2004.

7. Claimant's average weekly wage at the time of injury was $810.05.

8. Claimant was paid temporary total disability from May 24, 1990 to July 19, 1990, and from August 22, 1990 to October 27, 1990. Claimant was paid temporary partial disability from July 20, 1990 to August 21, 1990, and from October 28, 1990 to November 25, 1990. The compensation benefits paid to Claimant totaled $12,498.03.

9. Medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

[1] Referenced to the transcript and exhibits are as follows: trial transcript – Tr. __; Claimant's exhibits – CX-__, p. __; Employer's exhibits – EX-__, p. __; Administrative Law Judge exhibits – ALJX-__, p. __. Claimant initially submitted seven exhibits, but withdrew Exhibits Nos. 1 and 2 as indicated on Tr. 34.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Jurisdiction.

2. Nature and extent.

3. Loss of wage earning capacity, if any.

4. Maximum medical improvement.

5. Reasonableness and necessity of medical treatment.

III. STATEMENT OF THE CASE

A. Chronology

Claimant is a 44 year old male who has been married to his second wife for 10 years and has four children. After graduating from high school, he began working for Employer as a shop helper and truck driver. He attended night school to become an electrician and worked for Employer as an electrician, motor winder, and journeyman wireman.[2] (Tr. 143-144). In 1998, Claimant became a shop foreman and, in 2002, he became a shop superintendent. (Tr. 210-211).

On December 6, 1989, Claimant injured his back while disassembling a "main condensate pump motor off a Waterman ship" in Employer's shop. (Tr. 139). At the time of injury, Claimant was employed as a shop winder/journeyman wireman and his job involved working on electric motors of varying sizes and types from ships, buildings, and elevators. (Tr. 66, 117).

On February 22, 1990, Claimant sought treatment from Dr. Keppel and presented with complaints of low back pain. Dr. Keppel diagnosed a lumbar strain and instructed Claimant to attend physical therapy and begin an exercise program. (CX-5, pp. 8-9). An April 17, 1990 CAT scan and a May 25, 1990 MRI both revealed a bulge at Claimant's L4-5 level. Dr. Ruel opined the disc bulge was not degenerative in 1990 and did not likely pre-exist the December 6, 1989 work injury, as Claimant was 29 years old at that time. (CX-5, pp. 10-12). On May 24, 1990, Dr. Keppel placed Claimant off work and ordered "extensive" physical therapy after he presented with a popping sensation in his back. (CX-5, p. 13). On July 9, 1990, Claimant

[2] Claimant has never been licensed as an electrician, but is considered an "electrician" by the union hall. (EX-6, pp. 8-9).

informed Dr. Keppel that he could not modify his work activities and still do his job; Dr. Keppel released Claimant to half days of work on July 19, 1990. (CX-4, pp. 123, 261; CX-5, p. 17). On August 22, 1990, thoracic and lumbar myelograms revealed early degenerative changes in Claimant's spinal canal and vertebra, but not in the disc. (CX-5, pp., 14-15).

On August 23, 1990, Dr. Ruel took over Claimant's treatment and instructed him to stop working on September 7, 1990. (CX-4, p. 247; CX-5, p. 20). On October 12, 1990, Dr. Ruel recommended Claimant work half-days at light duty, and continues physical therapy. (CX-4, p. 240; CX-5, p. 23). On November 26, 1990, Dr. Ruel instructed Claimant to begin working full-time at light duty, which Dr. Ruel defined as lifting of no more than 30 pounds. (CX-4, p. 231; CX-5, pp. 29-31). On February 5, 1991, Claimant reported an increase in low back pain following a motor vehicle accident on January 17, 1991. (CX-5, p. 33). Claimant continued to treat with Dr. Ruel. At his deposition, Dr. Ruel indicated Claimant now suffers from degenerative disc disease and that his condition slowly continued to degenerate over time. (CX-5, p. 34).

Claimant received workers' compensation after his December, 1989, injury. (Tr. 143). Upon returning to work, Claimant performed the same job he held prior to his injury. (Tr. 191). According to Claimant, his post-injury work was "light duty" because he did not have to lift heavy objects or perform activities that would strain his back. (Tr. 191-193). After the injury, co-workers helped him lift heavy objects; if he could not perform a job, he would tell his supervisor. (EX-6, pp., 23, 28). Claimant believed his supervisors worked with him to ensure he would not re-injure himself. Although a medical report dated July 17, 1990, indicated that he could not modify his work duties, he reported to Dr. Ruel that he was doing modified work.[3] (Tr. 194; CX-5, p. 28). Stewart Woody Wilson and Val Chauvin testified Claimant performed the same duties before and after the December, 1989, accident. Claimant did not complain to Mr. Wilson about his back. (Tr. 66). Mr. Chauvin noticed Claimant was "being gentle on his back" after the injury, but did not recall any special considerations being given to Claimant or his job duties being altered in any way. (Tr. 123). In 1998, Claimant became a supervisor and his "normal job" no longer involved working with tools or motors, unless the company was short-handed. (Tr. 210).

On March 3, 2004, Claimant sought treatment for low back pain from Dr. William Knight after referral from another patient. (CX-3, p. 14). Dr. Knight did a series of six injections into Claimant's spine, back and hips and prescribed Arthrotec, Lortab, and methadone.[4] (Tr. 151; CX-3, pp., 5-15). Claimant did not inform Dr. Ruel that he was treating with or receiving prescriptions from Dr. Knight; Dr. Ruel released Claimant from his care upon receipt of such knowledge. (CX-5, pp., 61, 66). Dr. Ruel opined the medications prescribed by Dr. Knight were excessive, unnecessary, and unreasonable. (CX-5, p. 62). Claimant would like to treat with Dr. Bartholomew, a neurosurgeon. (Tr. 154-155).

[3] At hearing, Claimant testified that he did not recall telling a doctor that he performed his regular job because modified work was not available. (Tr. 194).

[4] Claimant testified that Dr. Knight prescribed Flexoril, Neurontin, Lortab, Lexipro, Methadone, and Lithoderm patches. (Tr. 152).

Since his December, 1989, injury, Claimant experiences low back strain and pain, especially when he bends or sits or stands in one position for a long period of time. (Tr. 144). He had difficulty picking up his children and he no longer participates in physical sports. (Tr. 145-146). His pain progressed over time to become more constant. (Tr. 147). At the time of formal hearing, Claimant's physical activities included cutting grass and other side jobs. (Tr. 163).

In August, 2004, Claimant was laid off during a reduction in force (RIF). (Tr. 72). At formal hearing, Mr. Wilson testified that the RIF were necessary because work was slow and he could not reduce the hours of union employees. Mr. Wilson indicated Claimant was included in the RIF because of theft, sarcasm, statements regarding putting Employer out of business, and disrespect towards Mr. Wilson and Mr. Wilson's wife. (Tr. 79-80, 84). Mr. Wilson further indicated Claimant was included in the RIF because he could not be trusted, was one of the highest paid employees, and was lazy. (Tr. 88-89). Two weeks following Claimant's termination, another journeyman wireman was placed in Claimant's supervisory position because work increased. (Tr. 74-77). Claimant received unemployment for 26 weeks at $258.00 per week, which was not opposed by Employer. (Tr. 91, 163). He has not sought employment since he stopped receiving unemployment. (Tr. 163).

Employer is an electrical contractor company and historically performed electrical work, including motor rewinding. (Tr. 48, 50). In 1989 and at the time of formal hearing, Employer's shop was located one to two blocks from the Industrial Canal, at 4525 North Claiborne Avenue, New Orleans, Louisiana. (Tr. 50). In 1989, Employer's business was more marine-orientated than land-based oriented; Employer filed an LS-202 form in May, 1990, that identified its business as "maritime repair." (Tr. 59). Its employees do not work solely on components taken from ships or vessels, but also work on components including elevator motors, cooling tower motors, and air-conditioner motors.[5] (Tr. 98). At the time of formal hearing, approximately 40% of Employer's business was maritime related. (Tr. 101).

Employer has a group of employees that go to ships to wire and rig motors and do installation, while his shop employees perform mechanical work on motors. (Tr. 97). Mr. Wilson estimated Claimant spent 90% of his time in the shop in 1989, with 10% of his time on vessels or "doing balancing work." (Tr. 94). Claimant spent the majority of his time working in the shop and estimated that 20% to 25% of his time was spent working on vessels in 1989. (Tr. 205).

B. Claimant's Testimony

Claimant described his work duties, injury, and pain as described above. Claimant accepted the supervisor position because he did not think his back could handle further physical labor. (Tr. 155). He was not a lazy employee and was never accused of being lazy. He did not steal from Employer; rather, Mr. Wilson was aware that other employees helped him with outside work on company time. (Tr. 158-159). Claimant did not state that he wanted to put

[5] Employer began working on elevator components around 1987. (Tr. 98).

Employer out of business, but said that he was "going to love it" when Employer put itself out of business. (Tr. 160-161). He was not disrespectful to Mr. Wilson's wife and believes his inclusion in the RIF was not "a money saving thing." (Tr. 161-162).

Claimant's lawn maintenance job requires use of 10 to 15 pound equipment. (Tr. 165). At times, his back pain is worse since his lay off because he does more physical labor. (Tr. 168). After the surveillance video was filmed, Claimant was not active for several days because he stayed at home to treat his back. (Tr. 164). He used two blowers on one occasion, but has not tried it again because it was too heavy. (Tr. 165). He put a "handyman ad" in the newspaper and tries to take any job that does not require roofing or flooring. (Tr. 190). His "handyman" jobs have included making screens, changing pull chains on a ceiling fan, pressure washing a sidewalk and trailer, and dismantling a sign.[6] (Tr. 204).

Claimant does not "take a card" at the union hall because he would not get work after disclosing a pre-existing back injury. (Tr. 164). He had to seek other employment to receive unemployment benefits; he "signed the book at the union hall" although he was not prepared to take a union job due to his back injury. (Tr. 182-183). He has not looked for other electrical work because it could jeopardize his union pension. He cannot get a job that pays as much as grass cutting because he would not be able to miss work when he is hurting. (Tr. 185).

Claimant thought Dr. Ruel would believe there was no need for him to treat with Dr. Knight. He also believed he could not change doctors because he already submitted his choice with the insurance company. (Tr. 150). At his last visit with Dr. Ruel, Claimant reported taking Arthrotec only and did not report the medications prescribed by Dr. Knight. (Tr. 175). He stated that he filled out a form regarding his medications on his first visit with Dr. Ruel, but did not recall filling out a form on his last visit. He would not have indicated that he was taking medication prescribed by Dr. Knight because Dr. Ruel would have discharged him. (Tr. 174-176). He took four Lortabs on the day prior to formal hearing and takes one-quarter tablet of methadone each day. (Tr. 177).

Claimant began seeing Dr. Knight because Dr. Ruel was not helping his pain. He hoped to benefit from the injections and hoped Dr. Knight "would write something to help [him] out with the pain." (Tr. 153). Because of the pain, he will continue to see Dr. Knight if Dr. Bartholomew does not prescribe narcotic medication. (Tr. 201-202). In the event he would need surgery, Claimant would prefer to have surgery performed by a neurosurgeon which is his reason for seeking treatment with Dr. Bartholomew. (Tr. 181).

Claimant believes he "reaggravated" his work injury several times while performing activities such as picking up a child, riding a lawnmower, or being involved in a motor vehicle

[6] At his deposition, Claimant testified that he spent three to four hours replacing screens on a house. He testified that he used the original screen frames and did not construct frames of his own. (EX-6, pp., 52-53). At formal hearing, he indicated that his deposition testimony regarded a job at "Steve Luke's mother and father's house." (Tr. 167). He had forgotten about the job shown in the surveillance video, which required him to build new frames for the screens and lasted until approximately 4:00 p.m. (Tr. 167).

accident. (EX-6, pp., 32-33). He testified that he is no longer active in sports, such as skiing or golf. He continues to hunt deer, which involves tree climbing to get into a deer stand. (Tr. 146; EX-6, pp., 33-37).

In the 1980s, Employer's employees went onto ships to remove and install motors or "do balancing." At the time of formal hearing, "the crew" would remove the motor and ask Employer to pick up the motor. (Tr. 205-207). Prior to his injury, Claimant would go on ships to "strap cable, pull generators, install motors, pull motors, hook up motors, pack tubing." (Tr. 139-140). On December 6, 1989, other employees from "Gulf Best" brought the motor into Employer's shop. (Tr. 139).

C. Testimony of Stewart Woody Wilson and Lloyd B. Chauvin Jr. (Val Chauvin)

Employer historically performed electrical work and, in 1984 or 1985, it changed locations from 333 St. Joseph Street, New Orleans, Louisiana to 4525 North Claiborne Avenue, New Orleans, Louisiana. (Tr. 50-51). A floodwall blocks a view of the Industrial Canal from Employer's shop on North Claiborne Avenue; employees drive approximately two miles to access the wharf through a floodgate at Florida Avenue. (Tr. 62-64). Employer works on ships and repairs motors on ships. (Tr. 52). The shop location is not based on proximity to the Industrial Canal. (Tr. 99).

Mr. Wilson did not witness Claimant's accident on December 6, 1989 accident. (Tr. 54). He was never aware of Claimant's work restrictions and, at the time of formal hearing, Employer did not have any available jobs that would accommodate a twenty-pound lifting restriction. (Tr. 96).

Mr. Wilson felt Claimant was lazy, but reprimands were not documented because Employer does not maintain personnel files. (Tr. 67-68). Claimant was not fired earlier because of his relationship with his father and Jack Prejan.[7] (Tr. 70). According to Mr. Wilson, Claimant used other employees to obtain "personal gains" while on Employer's time. He observed one employee making signs for Claimant's hunting camp and one truck driver use a company truck to "pick up corn for [Claimant's] hunting camp." (Tr. 81-82). None of the acts are documented. (Tr. 82).

Mr. Wilson reduced the hours of some employees by one day each week, after seeking permission from the union. Mr. Wilson terminated Claimant's employment through the RIF, rather than reduce his hours, because of his attitude. (Tr. 74). Although Employer's work increased two weeks after Claimant was laid off, Mr. Wilson stated that the increase was not substantial enough to rehire Claimant. (Tr. 78).

Mr. Chauvin was employed by Employer for almost 25 years and was as a shop superintendent at the time of his retirement in 2003. (Tr. 116-117). He felt Claimant had a good

[7] Mr. Prejean was Claimant's superintendent and replaced William Mason upon his retirement. (Tr. 70-72).

work ethic, performed good work, and was not lazy, although Claimant could have a bad attitude at times. He was not aware that Claimant may have stolen from Employer. (Tr. 118). During slow times, Employer would have a layoff and "get rid" of people due to work ethics; employees would then have a shorter workweek and take turns having days off. (Tr. 119). Employees were usually laid off because of "workmanship." (Tr. 121).

D. Testimony of William Mason, Jr.

Mr. Mason, Claimant's father, was employed by Employer for over 38 years until his retirement in 1994. (Tr. 125-126). He did not witness Claimant's December 6, 1989 injury. (Tr. 127). He did not directly supervise Claimant and Claimant did not receive preferences because he was Mr. Mason's son. (Tr. 130). To his knowledge, Claimant did "great work," no one indicated Claimant was lazy, and Claimant was not a troublemaker. (Tr. 131).

Employer worked on all kinds of electrical motors or generators. Its "main business" consisted of ship motors, which included motors used for pumps, cargo gear, air-conditioning, ventilation fans, forced-draft blowers, and main generators. (Tr. 127-128). Although Claimant went on ships, he did not go too often. To access the area where ships loaded and unloaded cargo, employees would not "ride around" a seawall, but had to ride onto the "wharf area." (Tr. 129). By the time Claimant began working for Employer, the electricians earned a marine pay rate though they were not always doing marine work. (Tr. 135).

E. Testimony of Private Investigator, Kenneth J. Faul

Mr. Faul, who testified at formal hearing, is a private investigator who conducted surveillance on Claimant from March to May 2005 and issued two reports. His surveillance included videotape on April 4, 2005; April 7, 2005; April 28, 2005; and April 29, 2005. (Tr. 105-107).

From approximately 2:49 p.m. until 3:19 p.m., on April 4, 2005, Claimant performed lawn maintenance activities, including pushing a lawn mower and using two leaf blowers. (EX-5). On April 7, 2005, Claimant constructed screens and placed them on a residence. (EX-5). His activities spanned from approximately 9:08 a.m. until 4:00 p.m. (Tr. 109; EX-5). He climbed in and out of the bed of a pick-up truck, carried sawhorses, carried a large sheet of plywood, worked while leaning forward at the waist, and carried a metal ladder with his right hand. (EX-5). The surveillance video dated April 28, 2005, shows Claimant edging a median at 9:15 a.m. He is shown carrying the edger with his right hand for several minutes while picking up garbage. He is also shown mowing the median with a riding lawnmower. His activities ended at approximately 10:27 a.m. (EX-5). From approximately 9:31 a.m. until 10:47 a.m., on April 29, 2005, Claimant performed lawn maintenance at a residence using an edger and a leaf blower. The video does not show Claimant using a riding lawnmower, but it does show him putting a riding lawnmower into a utility trailer. (EX-5).

F. Testimony of Vocational Expert, Carla Seyler

Ms. Seyler did not interview Claimant in conjunction with her vocational report, but made several attempts to contact Claimant's counsel. (Tr. 221-222). She met with Employer and reviewed the Employer's Report of Occupational Injury or Disease and the medical records of Drs. Ruel and Knight. (Tr. 222-223). She learned Claimant was an owner/operator of a lawn care business. (Tr. 224).

Ms. Seyler identified the following transferable skills: (1) an understanding of electrical work; (2) general mechanical abilities; (3) customer service skills; (4) an ability to organize and direct the work of others; (5) an ability to deal with people beyond receiving work instructions; (6) an ability to troubleshoot, and (7) an ability to keep administrative records. (Tr. 225). She understood Dr. Ruel provided "preventative restrictions" at his deposition, which were no lifting of greater than 20 pounds, avoidance of repetitive bending or twisting of his back, and no prolonged sitting or standing. (Tr. 225-226). She determined the lifting restriction placed Claimant's activities in the category of light physical exertion. (Tr. 226). Based upon her assessments, Ms. Seyler identified the following positions as suitable:

Position/Employer	Requirements and Duties
A motor rewinder/Precision PSI	Required at least two years experience, attention to detail, fine motor coordination, and the ability to read and write. Alternated sitting, standing, and walking; sitting for 40% to 60% of the day; lifting up to 20 pounds; occasional bending, stooping, and twisting. $18.00 to $24.00 per hour. (EX-1, p. 8).
An electric motor winder/ G&M Electric	Required one to two years experience, fine motor skills and the ability to work independently. Alternately sit, stand, and walk; lifting up to 20 pounds; occasional bending and twisting. $15.00 to $19.00 per hour. (EX-1, p. 8).
An electric motor repairer/ Scott Armature	Duties: troubleshoot, test, and record problem areas; use of handtools; attention to detail. Required completion of technical school or an apprenticeship program or experience in the field. Alternately sit, stand, and walk; occasional lifting up to 30 pounds; occasional bending. $12.00 to $16.00 per hour. (EX-1, pp. 8-9).
A service dispatcher/Trane, Inc.	Duties: answering phone calls and providing customer service; scheduling, assigning, and dispatching field technicians. Required a high school diploma or GED and basic computer skills;

	seated work; lifting of less than 20 pounds. $24,000.00 to $34,000.00 per year. (EX-1, p. 9).
A laborer dispatcher/ Holy Services	Duties: Interview applicants for placement in temporary industrial work assignments. Required organizational skills, the ability to interact with customers, and basic computer skills. Sedentary position with alternated standing and walking; lifting of less than 10 to 20 pounds. $400.00 to $500.00 per week. (EX-1, pp. 9-10).
A reservationist/dispatcher/ A-Confidential Transportation	Duties: answer incoming calls and provide information on products, services, and rates; dispatch vehicles and drivers as needed. Required ability to multi-task, attention to detail, ability to communicate by telephone, basic computer skills, and a high school diploma or GED. Seated position with standing and walking as needed; no lifting of more than 10 pounds. $25,000.00 per year. (EX-1, p. 10).
A service writer/Pepboys	Duties: greet customers and record customer service needs/problems; dispatch work to technicians; required mechanical background and high school diploma or GED. Alternately sit, stand, and walk; lift 10 to 15 pounds. $10.00 per hour. (EX-1, p. 10).
A service representative/courier/ LabCorp Central	Duties: drive a company vehicle to pick up/deliver lab specimens and complete paperwork. Required proficiency with numbers, organizational skills; high school diploma/GED preferred. Alternately sit, stand, and walk; accommodations provided for an individual who can lift up to 20 pounds. $7.44 to $11.43 per hour. (EX-1, p. 11).
An electrical sales representative/ Nu-Lite Electrical Wholesalers	Duties: sell electrical parts; sit at computer and input information. Alternately sit, stand, and walk; occasional lifting up to 20 pounds. High school diploma/GED preferred. Commission based position; approximately $30,000.00 per year. A similar position with a second company (G&M Electrical Sales) paid a base plus commission with average earnings of $30,000.00 to $35,000.00 per year. (EX-1, p. 11).

Dr. Ruel did not approve the electric motor repairer position or the service representative/courier position. (Tr. 234; EX-1, pp., 15-17). Dr. Laborde approved all jobs identified by Ms. Seyler. (EX-3, pp., 7-10).

G. Testimony of Stephen Furst

Mr. Furst was deposed by the parties on May 5, 2005. (CX-6). From June, 1986, to March, 1997, he was employed by Highlands Insurance Company and worked as a claims adjuster, claims supervisor, branch claims manager, and assistant regional claims manager. (CX-6, p., 6). Mr. Furst completed and signed an LS-202 form regarding Claimant's claim and indicated that Employer was a "maritime repair business." (CX-6, pp., 7, 9, 25). He determined that maritime repair was the general work performed by Employer based on other claims he handled for Employer. (CX-6, p. 9). Mr. Furst did not know why the form was filed five months late on May 28, 2005. (CX-6, p. 9). He did not recall disputing Claimant's claim based on compensability or jurisdiction. (CX-6, p. 11). An LS-207 was signed by Robert L. Judge, who was Mr. Furst's boss at the time of the deposition and was his adjuster in 1991. (CX-6, p. 13, 28).

H. Medical Records and Testimony of Dr. Ruel

Dr. Ruel is a board-certified orthopedic surgeon who was deposed by the parties on April 27, 2005. (CX-5, p. 6). He began treating Claimant on August 23, 1990 at the request of Dr. Keppel and recommended follow-up treatment, anti-inflammatory medication, and entry into a work-hardening program. (CX-5, p. 122). A report dated October 11, 1990, noted continued complaints of low back pain and intermittent complaints of leg pain. On September 21, 1990, he prescribed Xanax for stress and nervousness and scheduled a bone scan, which returned normal results. (CX-4, pp., 118, 120-121).

Claimant continued to treat with Dr. Ruel for low back pain. In a report dated March 6, 1992, Dr. Ruel noted increased pain following a January 19, 1991 motor vehicle accident. Dr. Ruel discontinued Claimant's physical therapy and identified the following activities as aggravating Claimant's back pain: vomiting, long car rides, prolonged sitting or standing, and squatting. (CX-4, pp., 109-110). A report dated October 30, 1992, indicated that Claimant underwent an EMG study that returned normal results. A report dated November 25, 1994, indicated an EMG study returned "mild findings" involving Claimant's left L4 nerve root. (CX-4, pp., 51-52, 87-88).

From February 25, 1991 through August 21, 2003, Dr. Ruel's handwritten medical reports release Claimant to regular duty work, although a report dated January 17, 1991, suggests that Claimant seek work activities "within the restrictions previously placed on him." (CX-4, pp. 59, 222). On August 17, 1998, Dr. Ruel noted Claimant performed "office work" without problems and, on November 16, 2000, he opined Claimant was "probably at MMI." (CX-4, pp. 27, 36). On February 25, 2002, Claimant reported working "regular duty in the office" and a March 4, 2002 MRI showed desiccation at Claimant's L4-5 and L5-S1 discs, as well as "a slight

asymmetric broad-based posterior bulge of the L4-5 and L5-S1 disc."[8] (CX-4, pp., 16-17). In August, 2003, Claimant reported that his back pain improved after he undertook a second job doing lawn maintenance. (CX-4, p. 139). Dr. Ruel last examined Claimant on April 4, 2005, at which time he recommended a MRI and EMG nerve studies; the MRI did not show a great change from the 2002 MRI. (CX-5, pp., 52-53). He discharged Claimant from his care at the time of his deposition.

At his deposition, Dr. Ruel indicated that the lack of objective findings identified by Dr. Keppel suggested Claimant did not have nerve pain. Although he testified that an individual suffering from facet arthritis and a lumbar sprain could present complaints of back pain for an extended period of time, Dr. Ruel would have expected the complaints to resolve within a year. (CX-5, p. 19). He opined Claimant's continued complaints were based on "some facet arthritis that was aggravated . . . by his back injury." (CX-5, pp., 26-27). Because of the difficulties experienced by Claimant following the injury, Dr. Ruel felt Claimant could not be discharged. (CX-5, p. 43). Based on Claimant's reports, Dr. Ruel believed Employer accommodated his restriction of no heavy lifting. By December, 1990, he felt Claimant showed improvement and, though he considered discharging Claimant in January, 1991, Claimant was not discharged because he continued to complain of pain. He testified that "conservative treatment" stopped and "observation" began when Claimant discontinued physical therapy on February 13, 1991.[9] (CX-5, pp., 31-32).

Dr. Ruel indicated Claimant's December, 1989, injury "brought on his symptoms" and he never really got well, with "multiple little bouts of episodes" exacerbated his symptoms. (CX-4, pp., 35-36). He believed Claimant suffered from "progressive degeneration" at the L4-5 and L5-S1 disc spaces, "with loss of water content of the disc." (CX-5, p. 54). Although Claimant's complaints completely resolved at times during the course of treatment, Dr. Ruel did not feel there was a complete resolution of Claimant's original injury. (CX-5, p. 55). Although he opined that the "progression of degeneration" is attributable to the 1989 injury, Dr. Ruel agreed that it could be reasonably explained as a "natural manifestation" of an underlying pathology in Claimant's spine. (CX-5, p. 58).

At his deposition, Dr. Ruel suggested Claimant limited his activities to a light duty capacity and avoid lifting over 20 pounds. He further suggested Claimant avoid repetitive bending or twisting at the waist. (CX-5, p. 66). Dr. Ruel would not recommend that Claimant undergo surgery or epidural steroid injections and opined Claimant will have backaches for the duration of his life. (CX-5, p. 68).

Dr. Ruel diagnosed Claimant with "degenerative lumbar disc disease, disc herniation, and facet arthritis." He also diagnosed "chronic nerve root irritation on EMG" and opined Claimant presented with "mechanical" back problems. (CX-5, pp., 76, 79).

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[8] Early desiccation at Claimant's L4-L5 level was also identified in a lumbar MRI dated July 24, 1996. (CX-4, p. 169). The desiccation indicated a degenerative process. (CX-5, p. 45).

[9] At his deposition, Dr. Ruel testified that Claimant received physical therapy through February 18, 1991, but his report dated March 6, 1992, indicates that the last physical therapy treatment occurred on February 13, 1991. (CX-4, p. 109; CX-5, p. 32).

I. Medical Records and Testimony of Dr. J. Monroe Laborde

Dr. Laborde, a board-certified orthopedic surgeon, was deposed by the parties on June 30, 2005, and examined Claimant at Employer's request. (EX-4, p. 5). On May 25, 2005, Claimant presented with complaints of back pain. (EX-3, p. 1). Although x-rays of Claimant's lumbar spine and pelvis returned negative results, Dr. Laborde noted that Claimant's November 16, 2004 lumbar MRI showed "bulging of the lower two discs with the bulge at L5-S1 being central and knee foramen being somewhat narrowed." Dr. Laborde diagnosed "common low back pain with a history of a strain type injury in 1989." He noted strain injuries typically heal within two months or less and found no objective evidence of Claimant's inability to perform his job as a shop electrician.[10] (EX-3, p. 2).

Dr. Laborde reviewed additional MRI reports of 1992 and 1996, as well as EMG nerve conduction studies of 1992, 1995, and 2002, and found the "objective tests" to be consistent with "aging process changes at the lower two lumbar discs and mild associated lumbar root abnormalities." He opined any work limitations would be due to a "combination of degenerative changes and superimposed psychological social and economic factors to a greater extent than the injury of 1989." (EX-3, p. 4).

At his deposition, Dr. Laborde reviewed a lumbar MRI dated May 25, 1990, and found it presented no evidence of a traumatic injury. (EX-4, p. 13). In a letter dated June 10, 2005, Dr. Laborde referenced Claimant's lumbar MRI of April 20, 2005, as well as an EMG nerve conduction study of April 27, 2005. He suggested the disc bulges and EMG abnormalities were due to the aging process and found no definite evidence of injury. (EX-3, p. 6). He opined the disc bulges pre-existed Claimant's 1989 accident. (EX-4, p. 35). Dr. Laborde agreed that complete resolution of Claimant's complaints throughout his course of treatment with Dr. Ruel would be consistent with a resolution of the original injury. (EX-4, p. 22).

Dr. Laborde did not believe Claimant needed medications such as Methadone, Lortabs, Soma, or Xanax and testified that he would not have prescribed such medications. (EX-4, p. 26). He indicated the medication was not "the preferred treatment" and felt that the prescriptions were "probably not" necessary. (EX-4, pp. 26-27). He found no objective need for medical treatment, but indicated that complaints of pain will be treated without objective problems. He opined Claimant did not need treatment due to the 1989 injury and that treatment with a neurosurgeon was not necessary at the time he examined Claimant. (EX-4, p. 25).

[10] At his deposition, Dr. Laborde agreed the back sprain should have physically healed within a couple of months, but indicated the back pain could continue for physical reasons, such as arthritis, or for psychological reasons. (EX-4, p. 20). Thus, back pain that continued for more than two months following a sprain would be more likely related to things other than the sprain. (EX-4, p. 21).

J. Medical Records of Dr. William Knight[11]

On March 17, 2004, Claimant reported that he could not return to heavy lifting following the December, 1989 accident and that he exercises caution when bending, lifting, or twisting. (CX-3, p. 14). Dr. Knight diagnosed "mechanical low back pain with normal neurologic exam" and "right sacroiliac chronic strain with dysfunctional motion likely secondary to ligamentous laxity." He prescribed Arthrotec and Lortab and recommended therapeutic injections to Claimant's sacroiliac and iliolumbar ligaments. (CX-3, p. 15). Claimant underwent a series of six injections between April 4, 2004 and November 2, 2004. (CX-3, pp., 7-13).

On November 2, 2004, Claimant reported re-aggravating his back pain while riding on a tractor. Although Claimant seemed "angry and frustrated regarding his lack of response to treatment," he continued his yard maintenance business and did electrician side work. Dr. Knight ordered a lumbar MRI. He prescribed methadone and instructed Claimant to take one-quarter of a tablet as needed daily, for severe pain only. (CX-3, p. 7). The MRI dated November 16, 2004, showed "L4-5 central posterior disc bulge and fissuring of disc, as well as posterior facet hypertrophy causing a relative stenosis." Dr. Knight also noted a L5-S1 disc bulge and fissuring, as well as neuroforminal narrowing. (CX-3, pp., 6, 48-49).

On February 11, 2005, Claimant reported an improvement in his lower back, which Dr. Knight attributed to the "prolotherapy injections." Claimant remained on Neurontin, methadone, Arthrotec, Flexeril, and Lortab. (CX-3, p. 5).

K. Medical Records of Dr. Bradley J. Bartholomew[12]

On July 12, 2005, Claimant presented with complaints of constant daily low back pain of varying intensity. He indicated that he occasionally experienced pain into both lower extremities. Dr. Bartholomew noted Claimant's medications included Lortab, Neurontin, Lexapro, and methadone. He reviewed lumbar MRIs dated April 20, 2005 and November 16, 2004, and noted both showed herniated discs with decreased water content at Claimant's L4-5 and L5-S1 levels. He opined Claimant was "neurologically intact" and discussed the options of a diskogram and "IDET" procedure. Dr. Bartholomew suggested follow-up only if Claimant was "interested in pursuing surgical work-up." He indicated that tolerance of the pain would be preferable to surgery.

IV. Discussion

A. Contentions of the Parties

[11] Dr. Knight is a "Doctor of Osteopath."

[12] Dr. Bartholomew's report was submitted in Claimant's Supplemental Post-Trial Memorandum on August 22, 2005.

Claimant contends he was injured on December 6, 1989, while employed as a marine electrician by Employer. He contends the work-related injury falls within the jurisdiction of the Act because he performed maritime duties relating to marine electric motor repair. He further contends he is permanently disabled because he has reached maximum medical improvement and is totally disabled because he cannot return to his former occupation.[13] Claimant argues Employer cannot rely on its previous light duty job to establish suitable alternative employment because Claimant was laid off due to a reduction in force. Lastly, Claimant contends he is entitled to reimbursement for his requested treatment with Dr. Bartholomew.

Employer contends jurisdiction under the Act does not exist in the present claim, arguing Claimant has not satisfied the situs requirement of 33 U.S.C. §903(a). According to Employer, its shop is located in a "mixed commercial, residential neighborhood in New Orleans," which is not "an extension of areas on the industrial canal where loading and unloading of vessels takes place." Employer further contends the medical evidence of record establishes that Claimant reached maximum medical improvement no later than January 17, 1991, at which time he had fully recovered from the injury without residual or permanent disability. Nonetheless, assuming Claimant sustained physical limitations as a result of the work injury, Employer argues he suffered no loss of wage earning capacity and Employer has no obligation to show additional alternative employment. Employer further argues that Claimant returned to his former job for 15 years and was terminated due to a reduction in force; accordingly, it contends it is not obligated to show suitable alternative employment. Finally, Employer contends there is no need for continuing medical treatment, including treatment by a neurosurgeon and narcotic medications.

B. Credibility of the Parties

It is well-settled that in arriving at a decision in this matter, the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol,* 211 F. 3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2002). Any credibility determination must be rational, in accordance with the law, and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S.Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

Although I find Claimant's consistent complaints of pain to his physicians are favorable to his credibility, I nonetheless afford little credit to his testimony. Most notably, regarding the

[13] Claimant's brief states he is at MMI and "permanent partial benefits are due because he testified he cannot work and the medical records support the fact that he cannot work in his former job." Additionally, during opening statements, Claimant's counsel requested temporary partial from 9/1/04 through 4/27/05 and permanent partial from 4/28/05 and continuing. (Tr. 8-9). Yet, Claimant argues that he cannot work and can't return to his former job.

"handyman" jobs, discrepancies existed between Claimant's deposition testimony and the activities reflected in the surveillance video and described at formal hearing. Also weighing against his credibility is Claimant's testimony that he "signed the book the union hall" in order to receive unemployment, but was not prepared to accept a union job. Finally, Claimant's credibility is further diminished by his failure to inform Dr. Ruel that he was treating with Dr. Knight and received prescriptions for narcotic medication.

C. Jurisdiction: Status and Situs

When Congress overhauled the Act in 1972, it expanded both the term "employee" and the concept of coverage. Section 902(3) was amended to read as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 902(3).

Section 903(a) was amended to read as follows:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .

33 U.S.C. § 903(a).

As a result of these amendments it has become clear that in order for a claimant to be covered under the Act as amended in 1972, he must satisfy both a "status" and "situs" test. In *Herb's Welding, Inc., v. Gray*, 470 U.S. 416 (1985), 105 U.S. 1421 at 1423 (1985) the Supreme Court stated:

> The Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U.S.C.§ 901 *et. seq.*, provided compensation for the death or disability of any person engaged in "maritime employment,"§ 902(3) if the disability or death results from an injury incurred upon navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing or building a vessel § 903(a). Thus a worker claiming under the Act must satisfy both a "status" and a "situs test."

Status is an occupational test requiring an examination of the character of the work to see whether the employee's activities bear a significant relationship to traditional maritime activity. Status may be determined either upon the maritime nature of Claimant's activity at the time of his injury or upon the maritime nature of his employment as a whole. *Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 781(1982); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5 th Cir 1978). The first alternative is referred to as the "moment of injury" test while the second alternative requires only that the claimant spend "some" portion of his overall employment performing maritime activities. *Northeast Marine Terminal Co., v. Caputo*, 432 U.S. at 273, 97 S. Ct. at 2362, *P.C. Pfeiffer Co., v. Ford*, 444 U.S. at 812, 100 S. Ct. at 337; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980); *See also Lennon v. Waterfront Transport*, 20 F.3d 658 (5th Cir. 1994). In *Hullinghorst Industries, Inc., v. Carroll*, 650 F.2d 750 at 755 (1981), the Fifth Circuit noted that it was clear that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lied within the scope of "maritime employment" as that term was used in the Act. *See also Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991).

In its post-hearing brief, Employer concedes that "Claimant could have been said to have met the status requirement of the Act since he was repairing a motor of an oceangoing vessel." Because Employer recognizes that Claimant was "performing ship repair services," I find and conclude Claimant satisfies the status requirement for coverage under the Act.

The term "situs" has been broadly interpreted to include land not contiguous to navigable water provided among other things that the site is suitable for maritime purposes and proximate to or close as possible given all circumstances navigable waterway. In *Texports Stevedore Co., v. Winchester*, 632 F. 2d 504, 513-14 (5th Cir. 1980), the Fifth Circuit stated:

> The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area....Just as we disapprove of a test that disposes of the question based totally on the presence of intervening or surrounding maritime facilities, we also reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. We would not extend coverage in this case to downtown Houston. The site must have some nexus with the waterfront.
>
> Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near". "Adjoining" can mean "neighboring." To instill in the term its broader meaning is in keeping with the spirit of the congressional purposes. So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWCA.

"Area" is defined by its function, i.e., it must be customarily, but not exclusively used by an employer to load, unload, repair or build a vessel. *Textports Stevedore Co.*, 632 F.2d at 515.

In addition, the Fifth Circuit stated that the area to be examined is the place of injury and its relationship to navigable waters. *Jacksonville Shipyards v. Perdue*, 539 F.2d 535 (5th Cir.1976) *vacated and remanded on other grounds*, 433 U.S. 904 (1977). *See also Nelson v. Gray F. Athinson Construction Co.*, 29 BRBS 39 (1995); *Brown v. Bath Iron Works Corp.*, 22 BRBS 384, 389 (1989); *Davis v. Dovan Co. of California*, 20 BRBS 121 (1987) *aff'd mem.* 865 F.2d 1257 (4th Cir 1989); *Lasofsky v. Arthur J. Trickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.* 853 F. 2d 919 (3rd Cir. 1988).

In *Brady-Hamilton Stevedore Co., v Herron*, 568 F.2d 137 (1978), the Third Circuit set forth a functional analysis approach for determining maritime situs. This analysis included the following factors: (1) particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

I find and conclude Claimant satisfies the situs requirement for coverage under the Act. Claimant was injured at Employer's shop, which was and is located approximately two blocks from the Industrial Canal. According to Employer, situs is not met because the injury occurred neither on a navigable body of water nor on an adjoining area customarily used for loading, unloading, repairing, or building a vessel. In support of its contention, Employer notes that the shop is located in a "mixed commercial, residential neighborhood" which houses "land-based, non-marine businesses." Employer further notes that a flood-wall blocks access to the Industrial Canal and argues that the location of the shop was not chosen based on its proximity to the Industrial Canal.

I am not persuaded by Employer's contentions. Although the testimony indicates that a flood wall stands between Employer's shop and the Industrial Canal, it is unclear whether the flood wall was in place at the time of Claimant's accident in 1989. Employer was engaged in the business of maritime repair and Mr. Wilson testified that, in 1989, its business was more marine-oriented than land-based. Accordingly, I find Employer's location approximately two blocks from the Industrial Canal is arguably not fortuitous. Given the proximity of Employer's shop to such a navigable waterway, I find and conclude Claimant has satisfied the situs requirement for coverage under the Act.

Based on the foregoing, I find and conclude that Claimant has satisfied both the status and situs tests. Therefore, jurisdiction under the Act is proper for this claim.

D. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc., v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990));

Wright v. Connolly-Pacific Co., 25 BRBS 161, 168 (1991). Ordinarily, the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. §556(d)(2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. §920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. §556(d) (2002); *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc., v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982); *see also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

In the present matter, the parties stipulated that Claimant sustained a back injury on December 6, 1989, while working in the course and scope of his employment with Employer. The medical evidence of record, however, contains a diagnosis of a lumbar strain/sprain, as well as a diagnosis of degenerative changes in Claimant's low back. While I find the stipulations of the parties is sufficient to invoke the Section 20(a) presumption for both diagnoses, I find the record contains reports from physicians which arguably rebut a finding of compensability and, thus, I find a review of the record is necessary.

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts – not mere speculation – that the harm was not work–related." *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003). The Court went on to stated an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90, (citing *Conoco, Inc.*, 194 F.3d at 690). *See Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd*

mem., 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv., Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

I find Employer has presented no evidence to rebut the Section 20(a) presumption regarding a lumbar sprain and further find and conclude the injury is compensable.

At the time of his examination of Claimant in 2005, Dr. Laborde found Claimant's lumbar condition consistent with the aging process and opined Claimant's back sprain should have healed within two months following the injury. He further opined any physical limitations would be most likely attributable to degenerative changes and "psychological social and economic factors" more than it would be attributable to the 1989 injury. I find the opinion of Dr. Laborde is substantial evidence to rebut the presumption that Claimant's degenerative condition is work related.

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Colleries*, 512 U.S. at 281.

Although Dr. Ruel's opinion is arguably entitled to greater weight as Claimant's treating physician, I find his opinion is equivocal regarding the cause of Claimant's degenerative changes. Dr. Ruel opined that Claimant's degenerative changes were attributable to the 1989 injury, but also agreed that Claimant's condition reasonably could be explained as a "natural manifestation" of an underlying spinal pathology with the original injury being completely resolved. Although Dr. Ruel did not believe Claimant's original injury ever completely resolved, the medical records identify several occasions where Claimant reported alleviation of back pain followed by increased back pain after a motor vehicle accident, illness, picking up a child, or physical activity.

It is noted that an April, 1990, CAT scan and a May, 1990, MRI revealed a bulge at Claimant's L4-5 level, which Dr. Ruel opined was a herniation and characterized as not degenerative and not likely pre-existing the 1989 injury. However, Dr. Keppel found no evidence of "frank herniation" on the MRI and later found no evidence of disc herniation or nerve root impingement on an August 22, 1990 myelogram. Rather, it is noted that both Drs. Keppel and Laborde opined Claimant sustained a lumbar strain/sprain in 1989, a condition that Dr. Keppel and Dr. Ruel would have expected to resolve within two months to one year following the injury. The first indication of "mild findings" on an EMG study occurred nearly five years after the injury, in 1994.

Dr. Ruel offers the only opinion to support finding a causal connection between Claimant's degenerative condition and the 1989 injury, but, as previously discussed, I find Dr.

Ruel's opinion to be equivocal as to whether the degenerative changes were the result of a natural progression or the work-related injury. Consequently, after reviewing the record and weighing the evidence, I find and conclude the degenerative changes in Claimant's low back are not related to the December 6, 1989 work accident.

Based on the foregoing, I find and conclude Claimant sustained a compensable low back strain/sprain on December 6, 1989. I further find and conclude Claimant's degenerative low back changes are unrelated to the work accident and, thus, are not compensable.

E. Nature and Extent of Disability

"Disability" under the Act means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs., of America*, 25 BRBS 100, 110 (1991).

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.,* 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co., v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). An injured worker's impairment may be found to have changed from temporary to permanent under either of two tests. *Eckley v. Fibrex & Shipping Co.,* 21 BRBS 120, 122-23 (1988).

Under the first test, a residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). Under the second test, a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). *See also Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984)(physician's evaluations of claimant indicated that his heart condition, although improved, was of indefinite duration); *Air America, Inc., v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment, with a view toward improving his condition. *Leech v. Service Eng'g Co.*, 15 BRBS 18, 21 (1982).

Claimant first sought treatment for his work-related injury in February, 1990. For approximately the next fifteen years, Claimant treated with Dr. Ruel and presented with continued complaints of low back pain. Nonetheless, Dr. Ruel testified that he contemplated discharging Claimant from treatment in January 1991 and further testified that his "conservative

treatment" of Claimant became "observation" when Claimant stopped physical therapy on February 13, 1991. Moreover, Dr. Ruel's subsequent reports and office notes state Claimant was performing "regular" duty work and several of Claimant's insurance forms also indicate that his work status was "regular duty." Dr. Ruel testified that he would have expected a lumbar sprain to heal within a year of the date of injury, while Dr. Laborde opined a strain injury would typically heal within two months. Based on the observational nature of Claimant's treatment after February 13, 1991, the regular release of Claimant to "regular" work duties as of February 25, 1991, and the testimony of Drs. Ruel and Laborde regarding heal-time for a sprain/strain injury, I find and conclude the medical evidence of record supports a finding that Claimant's lumbar strain/sprain reached a state of permanency on February 13, 1991.

The Act does not provide standards to distinguish between classifications of degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co., v. Hayes*, 930 F.2d 424, 229-30 (5th Cir. 1991); *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.,* 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Mr. Wilson and Mr. Chauvin testified that Claimant performed the same work duties before and after the accident. Even Claimant agreed that he performed the same job before and after his injury, although he believed Employer provided accommodations to ensure he would not sustain a re-injury. Neither the record nor the parties addressed any decrease in Claimant's earning capacity following the 1989 injury. Thus, I find and conclude Claimant did not sustain a loss of wage earning capacity and was not disabled during his continued employment with Employer. I further find and conclude any physical restrictions assigned to Claimant at the time of his lay off were unrelated to the compensable injury, having determined that his lumbar strain/sprain reached a state of permanency on February 13, 1991, without physical restrictions. Rather, I find any physical restrictions placed on Claimant after the date his lumbar strain/sprain reached permanency were caused by the degenerative process as opposed to his the lumbar injury. Having already found that Claimant's degenerative condition is not compensable and unrelated to the December 6, 1989 work injury, I further find and conclude Claimant has not established a *prima facie* case of total disability as a result of his work-related injury.

Assuming *arguendo* that Claimant's 1989 lumbar strain/sprain resulted in physical restrictions to establish a *prima facie* case of total disability, Employer/Carrier would bear the burden of demonstrating suitable alternative employment.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937

F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999)(crediting employee's reports of pain); *Mijangos,* 948 F.2d at 944-45 (crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the Claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth*., 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions: (1) Considering the claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings ino play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

An employer is not a long-term guarantor of employment. *Olsen v. Triple A Mach. Shops*, 25 BRBS 40 (1991); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991). A person who has regular and continuous post-injury employment "must take chances on unemployment like anyone else." *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 658 (1979). Compare *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988) (where a claimant works for a period of time in **employer's** facility but is subsequently laid off due to a lack of suitable work, employer has not established suitable alternate employment), and *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981) (compensation not due when **employer's** reduction-in-force prevents the claimant from working).

Assuming *arguendo* that Claimant's lumbar injury resulted in permanent physical restrictions, Claimant's own testimony indicates that Employer accommodated his physical restrictions. Accordingly, I find Employer provided suitable employment for approximately 15 years. Even if Employer did not make special concessions to accommodate Claimant's physical restrictions, Claimant was able to satisfactorily perform his job duties until he was laid off in 2004 due to a reduction in force. Because Claimant remained employed by Employer for such a lengthy period of time following his injury, I find and conclude Employer has met its burden of demonstrating suitable alternative employment and is not required to do more.

Further, if Employer had not already met its burden of demonstrating suitable alternative, I find suitable alternative employment has been established by Ms. Seyler's vocational report. Dr. Ruel opined that Claimant could not work in only two of the positions identified by Ms. Seyler: (1) electric motor repairer with Scott Armature and (2) service representative/courier with LabCorp Central. After reviewing the job duties and requirements outlined for each position and considering Claimant's education and experience, as well as the physical restrictions assigned by Dr. Ruel, I find and conclude that the jobs approved by Dr. Ruel establish the availability of suitable alternative employment.

F. Reasonableness and Necessity of Medical Treatment

Dr. Ruel discharged Claimant from treatment upon being informed that Claimant had treated with Dr. Knight. Claimant now requests treatment with Dr. Bartholomew, contending Dr. Ruel is no longer his treating physician. Employer contests Claimant's request and argues that there is no need for continued medical treatment, that treatment by a neurosurgeon is unnecessary, and that narcotic medications are unnecessary and unreasonable.[14]

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989).

The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. § 920 (stating that "it shall be presumed in the absence of substantial evidence to the contrary - (a) That the claim comes within the provisions of this chapter. . ."); *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809 (1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). *Cf. Schoen v. United States Chamber of Commerce*, 30 BRBS 112, 113-14 (1996)(finding that the Section 20(a) presumption did not apply in determining whether the charges incurred for self procured reasonable and necessary medical treatment were reasonable, and a claimant has the burden of proving the elements of the claim for medical benefits). Under the Administrative Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Greenwich Collieries*, 512 U.S. at 281. The Section 20 presumptions were left untouched by *Greenwich Collieries*. *Id* at 280. Accordingly, once a claimant has established a *prima facie* case that medical treatment is reasonable and necessary, the employer must produce contrary evidence, and if that evidence is sufficiently substantial, the presumption dissolves and claimant is left with the ultimate burden of persuasion. *American Grain Trimmers, Inc., v.*

[14] At formal hearing, Employer's counsel indicated that Claimant withdrew his claim regarding treatment with Dr. Knight and the joint stipulation indicates that liability for Dr. Knight's bill was removed as an unresolved issue.

Director, OWCP, 181 F.3d 810, 816-17 (7th Cir. 1999). Thus, the burden that shifts to the employer is the burden of production only. *Id*. at 817.

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). Here, Dr. Ruel testified that he did not discharge Claimant prior to his deposition because Claimant presented with continuing complaints of pain during the fifteen year course of treatment and he did not feel there was a complete resolution of the 1989 injury. Thus, I find a qualified physician indicated that continued medical treatment due to a work-related injury, which establishes a *prima facie* case that the treatment is both reasonable and necessary.

Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). The Fifth Circuit uses a substantial evidence test in determining if an employer presented sufficient evidence to overcome a Section 20 presumption. *See Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999)(stating that "[o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related.")(citing *Bridier v. Alabama Dry Dock & Shipbuilding Corp* , 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated on the substantial evidence test in the context of causation:

> . . . [T]he employer [is] required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986)(emphasis in original). *See also*, *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard).

Dr. Laborde testified that Claimant presented no objective need for medical treatment and that physicians will treat a patient presenting with complaints of pain in the absence of objective problems. With regard to Claimant, Dr. Laborde did not feel he needed further treatment as a result of the 1989 injury and felt treatment with a neurosurgeon was not necessary at the time he examined Claimant. According to Dr. Bartholomew's office note, Claimant was neurologically intact and he indicated a preference that Claimant tolerate the pain, if possible, rather than pursue surgery. Based on the foregoing, I find and conclude Employer has presented substantial evidence to show that the requested medical treatment is neither reasonable nor necessary.

Once the employer offers sufficient evidence to rebut the Section 20 presumption, the claimant must establish entitlement to the medical procedure based on the record as a whole. *See Noble Drilling Co., v. Drake*, 795 F.2d 478, 481 (5th Cir. 1981). If, based on the record, the

evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281. The opinion of a treating physician is entitled to special weight. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 201 n.6 (2001); *Cf. Consolidation Coal Co., v. Director, OWCP*, 54 F.3d 434, 438 (7th Cir. 1995)(disparaging a "mechanical determination" favoring a treating physician when the evidence is equally weighted). An ALJ may credit the report of a treating physician over others as long as there is substantial evidence in the record to support such a conclusion. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001).

Despite his opinion that Claimant's 1989 injury never entirely resolved, Dr. Ruel's diagnosis of Claimant's condition in 2005 consisted of "degenerative lumbar disc disease, disc herniation, and facet arthritis." he agreed the "progression of degeneration" of Claimant's condition could have been attributable to either the 1989 incident or to a natural manifestation of an underlying spinal condition. Accordingly, I find it is unclear from Dr. Ruel's testimony whether Claimant's continued medical treatment was necessitated by the 1989 injury or by the degenerative changes that I have found non-compensable. On the other hand, Dr. Laborde unequivocally opined that Claimant did not require continuing treatment for his 1989 injury and that an evaluation by a neurosurgeon was unnecessary. Further, Dr. Bartholomew's office note indicates that follow-up would only be necessary if Claimant was interested in pursuing surgical options. There is no indication in the record that any of Claimant's doctors felt surgery was indicated; Dr. Ruel specifically stated that "at no time [during the course of treatment] did [Claimant's] condition require surgery." (CX-5, p. 77).

After weighing the record evidence, I find and conclude continued medical treatment, including treatment from Dr. Bartholomew, is unreasonable and unnecessary.

G. Conclusion

Claimant sustained a compensable low back injury on December 6, 1989, and returned to his regular job duties when the injury reached a state of permanency on February 13, 1991. He sustained no loss of wage earning capacity and was not disabled during his continued employment with Employer. Any work restrictions or limitations on Claimant's activities prior to or after his lay off in September, 2004, are unrelated to the December 6, 1989 work injury. Thus, Claimant is not entitled to any disability compensation. Assuming *arguendo* that Claimant was totally disabled due to physical restrictions resulting from the December 6, 1989 injury, Employer/Carrier has no further obligation to demonstrate suitable alternative employment, as Claimant remained employed for approximately fifteen years following the injury. Even if the burden of demonstrating suitable alternative employment remained, Employer/Carrier has met its burden with the jobs identified in Ms. Seyler's vocational report.

Employer is not liable for additional medical benefits as Claimant has not established that continuing medical treatment is reasonable and necessary.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Claimant's claim for compensation and medical benefits is hereby **DENIED.**

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE